

Exemption No. 6541

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C. 20591

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In the matter of the petition of

EAA AVIATION FOUNDATION, INC.

AND

EXPERIMENTAL AIRCRAFT ASSOCIATION, INC.

for an exemption from Sections 91.315,
119.5(g) and 119.21(a) of the Federal
Aviation Regulation

* Regulatory Docket
* No. 28673

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GRANT OF EXEMPTION

By letter dated August 26, 1996, John W. Harrington, Law Offices of Ross and Harrington, 154 West Hubbard Street, Suite 300, Chicago, Illinois 60610, petitioned on behalf of EAA Aviation Foundation, Inc. and Experimental Aircraft Association, Inc. (collectively to be referred hereafter as EAA), for an exemption from Section 91.315 of the Federal Aviation Regulations (FAR). After further review of the kind of operation being requested under this exemption, it was determined that EAA also needs relief from Sections 119.5(g) and 119.21(a). A grant of exemption would permit EAA to operate its former military Boeing B-17 airplane, that holds a limited airworthiness certificate, for the purpose of carrying passengers on local flights in return for receiving donations.

Petitioner requires relief from the following regulation:

Section 91.315 prescribes that no person may operate a limited category civil aircraft for carrying persons or property for compensation or hire.

Section 119.5(g) prescribes, in pertinent part, that no person may operate as a commercial operator without, or in violation of, an appropriate certificate and appropriate specifications.

Section 119.21(a) prescribes, in pertinent part, that each person who conducts operations as a commercial operator engaged in intrastate common carriage of persons for compensation shall comply with the certification and operation specifications in subpart C of part 119. Subpart C of part 119 describes certification, operation specifications, and other requirements for operations conducted under parts 121 and 135.

The petitioner has submitted the following information in support of its petition:

EAA states that the granting of this exemption will enable it to be able to continue to afford the promotion, preservation, crew operating experience, and high maintenance costs of the B-17 airplane for education and historical purposes. The B-17 was an integral part of EAA's recent Convention which was attended by well over 800,000 thousand people. The airplane's presence provided an unsurpassed opportunity for the B-17 Historical Society members and also the general public to learn about the role of the B-17 in our country's history. EAA states that just since 1994, 3,747 members of its B-17 Historical Society have been afforded the opportunity to participate in a flight of the airplane. EAA has conducted 625 flights for its members at 152 locations throughout the United States.

EAA states that a critical fact relative to its petition is that the opportunity to participate in a flight experience is not open to the general public. It is only afforded to members of EAA's B-17 Historical Society and all participates must be members of EAA. The donations provided to EAA by these B-17 Historical Society members is utilized for maintenance and restoration of the B-17 airplane. In addition, these B-17 Historical Society members receive a B-17 jacket, a photo, and a newsletters for their contribution.

In addition, EAA states that the continued operation of the B-17 by it providing static tours and displays throughout the United States allows for the general public to learn about airplane's important role in our country's history.

EAA states that its Foundation is a nonstock Wisconsin corporation which been granted Section 501(c)(3) status by the Internal Revenue Service. The Foundation was organized for educational purposes for providing aeronautical education to its members and the general public. The continued operation of the B-17 is critical to the EAA Aviation Foundation, Inc. and to the Experimental Aircraft Association, Inc. educational, charitable, and other program goals.

In addressing safety concerns over the granting of its exemption, EAA states that the pilots that operate its B-17, must be type rated and current. Many of the pilots are either current air carrier pilots or experienced transport aircraft operators, with ten of thousands of hours of experience. All flights are flown with a minimum of three persons that includes a person designated as a crew chief who is knowledgeable on B-17 emergency systems and procedures. The B-17 is maintained and inspected in accordance with FAA aircraft specification L-1-3. EAA maintains its B-17 under an FAA approved inspection program which meets the requirements of Section 91.409. Pursuant to the approved inspection program, the airplane undergoes annual and 100-hour maintenance inspections, and also undergoes 25 hour inspections. Additionally, the airplane is maintained in accordance with the United States Air Force Technical Orders. All maintenance is and will be accomplished and/or supervised by FAA certificated airframe and powerplant mechanics and those mechanics undergo recurrent training annually.

EAA states that the granting of this exemption would provide a continued opportunity to provide B-17 Historical Society members with the unique opportunity to appreciate the historical significance of the B-17. Further, the derivative benefits which flow to the general public as a result of the operation and display of the airplane are significant. Without the financial support that the B-17 Historical Society provides, the educational and historical aspects of this program will be lost to its members and to the general public.

EAA states an important concern is the effect that the granting of this exemption would have on part 121 and 135 certificate holders. Clearly, those who participate in a flight experience of the B-17 are not aboard the airplane for the purpose of transportation. They are there to participate in the educational and historical experience only and not for the purpose of transportation. The kinds of operations conducted by EAA with its B-17 presents no competition of any kind to part 121 and 135 certificate holders. Further, EAA's operation is not in the business of holding itself out for transportation for compensation or hire as its operation is merely for the purpose of being able to continue to afford providing educational and historical benefits to its members. The donations received from its members for a flight experience in its B-17 is for the purpose of defraying the costs of promoting, preserving, crew operating experience, and high maintenance costs of the B-17 airplane so as to provide educational and historical value to its members and the general public.

A summary of the original petition was published in the Federal Register on September 10, 1996 (61 FR 47779). On October

8, 1996, the summary was republished in the Federal Register (61 FR 52836). No comments were received on the original publication. Six comments were received on the republication, and all the commenters indicated support for granting the exemption.

The FAA's analysis/summary is as follows:

It is the FAA's policy that the regulatory scheme is in place to ensure that those who participate in aviation are held to appropriate safety standards. Therefore, an exemption from aviation safety regulations is not routinely granted if the proposed operation can be performed in full compliance with the rules. It is incumbent upon those requesting an exemption from a particular standard or set of standards that they articulate first, an overriding public interest in the operation and second, the methods they will employ to establish an appropriate level of safety.

In this case, EAA has articulated an overriding public interest in the continued operation of the B-17 airplane.

The FAA recognizes EAA's argument that its situation is unique in that the only way for a person to actually experience the flight characteristics of the B-17 is to be able to fly in the actual airplane. No other airplane can replicate that experience.

The FAA believes that the preservation of U.S. aviation history is in the public interest, just as the preservation of historic buildings, historic landmarks, and historic neighborhoods have been determined to be in the public interest. While aviation history can be represented in static display in museums, in the same way historic landmarks could be represented in a museum, the public has shown support and a desire to have these World War II vintage airplanes maintained and operated to allow them to experience a flight in these historic airplanes.

EAA has stated that there is substantial cost incurred in order to preserve the B-17. To defray these substantial costs, EAA accepts donations from members of the B-17 Society. In exchange for the donations, members receive a jacket and other indications of membership. Additionally, members receive the opportunity for a ride on the B-17. While EAA does allow non-contributors to ride on the airplane occasionally, an activity that, in and of itself, requires no exemption (i.e., it is fully authorized by the FAR's), the members of the Society are assured such a ride if they present themselves at any of the events where the airplane is showcased. It is the relation between donations and the provision of a ride in the B-17 that results in the determination that the airplane is being operated for compensation. It is for this reason that in order to continue the operation of the airplane and to ensure the

public can experience this part of aviation history, that EAA seeks an exemption from 91.315.

The FAA has determined that it is the unique aspect of protecting and preserving the flight experience in the B-17 that differentiates EAA's request for an exemption from other requests for exemption from Section 91.315. In other similar requests for exemption, the FAA determined that the flight operation could be accomplished by an aircraft that holds a standard airworthiness certificate. In keeping with the general policy, these requests for exemption were denied. In EAA's case, if the history and experience of flight in the B-17 could be accomplished in a standard airworthiness category aircraft, then there would be no compelling reason to grant this exemption. However, that is not the case. By definition, no other airplane can provide the public the unique opportunity to experience flight in the historical B-17.

EAA has stated a compelling argument that its operation is in the public interest to maintain its vintage World War II airplane in an operational status. The only way it can do so, is to accept a financial contribution to defray the high costs of maintaining the airplane and ensuring crew operating experience. Partially in return, paying members of the public receive a local flight. Without this incentive, it is reasonable to conclude that EAA would not be able to raise sufficient funds to maintain the aircraft and provide this flying experience to the public.

Although the FAA has for the most part denied all past requests for exemption to operate an aircraft that only holds a limited airworthiness certificate, for other than the purposes specifically permitted by the aircraft's type certificate, an exception is being made in EAA's request for an exemption.

Having determined that the grant of exemption from Section 91.315 is in the public interest, the FAA must also determine that the applicant has taken steps to provide an appropriate level of safety. In most cases, in order to provide a ride in an aircraft and receive compensation, the operator must comply with part 121 or part 135 of the FAR. Through these regulatory schemes, the FAA can be assured that an appropriate safety standard is being met.

Part 121 was promulgated to establish standards for the highest levels of safety for the carriage of people or property in an aircraft that holds a standard airworthiness certificate. It establishes appropriate safety standards for operations where a passenger purchases a ticket and has every reason to expect that the operation conforms to all of those standards. It does not appear that when part 121 was promulgated, the kind of operation and compensation proposed

in this request were contemplated. Nonetheless, as written, part 121 is the applicable set of safety standards for EAA to meet in this case, but the FAA recognizes EAA's compelling argument that its situation warrants special consideration.

As EAA has previously stated, it performs extensive maintenance on its airplane. It has a maintenance program that has been approved by the FAA and all work on the airplane is performed by FAA certificated airframe and powerplant mechanics, or performed at an FAA certificated repair station. The FAA has established conditions for a maintenance approved program and inspections for the airplane when they are operated under the terms of this grant of exemption. EAA shall continue to maintain its B-17 in accordance with the following:

- a. Maintenance requirements as specified in its B-17's type specification sheet, as amended.
- b. FAA-approved maintenance inspection program which shall at least meet the requirements of Section 91.409; and
- c. Appropriate military technical manuals on the B-17.

While the FAA has stated that former military aircraft can present significant unknowns when it comes to safety matters such as life-limited parts and aircraft design, the extensive maintenance and inspection program followed by EAA to maintain its airplane minimizes this concern.

In addition, all flight crew members are required to meet high qualification and training requirements. For example, the pilot crewmembers will be required to meet the following qualification and training requirements:

The pilot-in-command crewmember must --

- a. Hold at least a commercial pilot certificate with a multi-engine airplane rating, an airplane instrument rating, and a B-17 type rating;
- b. Have completed EAA's B-17 qualification and recurrent flight and ground training program within the previous 12 calendar months;
- c. Have at least a total of 2500 hours of aeronautical flight experience, 1000 hours of aeronautical flight experience in multiengine airplanes, and 25 hours in a B-17,

or in the alternative,

Have at least a total of 1000 hours of aeronautical

flight experience, 200 hours of aeronautical flight experience in multiengine airplanes, and 100 hours and 50 takeoffs and landings in a B-17; and

- d. Have accomplished 3 takeoffs and 3 landings to a full stop in a B-17 within the previous 90 days prior to serving as a pilot in command.

The second-in-command crewmember must --

- a. Hold at least a commercial pilot certificate with a multi-engine airplane rating and an airplane instrument rating;
- b. Have completed EAA's B-17 qualification and recurrent flight and ground training program within the previous 12 calendar months;
- c. Have at least a total of 1500 hours of aeronautical flight experience, 250 hours of aeronautical flight experience in multiengine airplanes,

or in the alternative,

Have at least a total of 500 hours of aeronautical flight experience, 100 hours of aeronautical flight experience in multiengine airplanes, and 25 hours and 10 takeoffs and landings in a B-17; and

- d. Have accomplished 3 takeoffs and 3 landings to a full stop in a B-17 within the previous 90 days prior to serving as a second in command.

These requirements will ensure that EAA is maintaining a highly skilled and qualified cadre of pilots for the operation of its airplane.

FAA notes that those who choose to accept rides on the B-17 are not generally in the nature of a passenger purchasing a ticket. For the most part, the "paying" passengers on its airplane are contributing members to its organization. These passengers have made the decision to support the continued operation of this historic airplane through a substantial monetary donation. These passengers are familiar with the airplane's military history and are aware that it is not a standard category aircraft. Unlike passengers who purchase tickets and embark on a trip on, for example, any aircraft that happens to be provided by an airline, these passengers are solely and specifically seeking the experience of flying on this historic airplane. For those B-17 passengers who may not be fully acquainted with the history of the airplane, its appearance alone provides them notice that the trip they are about to undertake is a step into the history of aviation.

FAA recognizes that these programs outlined by EAA for the maintenance and operation of its airplane do not equate to meeting the requirements of part 121. Nonetheless, the FAA has determined that these programs, and the fact that the passengers are familiar with the history and operation of the airplane, establish an appropriate level of safety for this operation and support the grant of exemption from Sections 119.5(g) and 119.21(a).

While it can be assumed that those who ride on the B-17 are knowledgeable consumers who have made a decision to take part in this flight experience, the FAA believes it is appropriate that EAA provide specific notice to each passenger that its airplane does not hold a standard airworthiness certificate and that the FAA has authorized the flight under a grant of exemption from Sections 91.315, 119.5(g), and 119.21(a) and FAA requirements otherwise applicable to large aircraft that carry passengers for compensation.

In addition, to enhance the safety of the flight, the FAA believes it is appropriate to limit these flights to a 50 nautical mile radius of the departure airport and the only permitted landing shall be at that departure airport.

The decision to grant this request for exemption is based upon very specific limitations and conditions that ensure the public's interest in preserving this vintage World War II airplanes while still maintaining an acceptable level of aviation safety for an operation in which compensation is involved.

As a result of EAA's request for a grant of exemption and other expected requests from similar kinds of operators who have expressed an interest for performing these kinds of operations, the FAA has determined that it is time to initiate a formal rulemaking action. The FAA has initiated rulemaking to provide for operators of United States vintage, former military aircraft to provide rides to the public for compensation or hire. The FAA believes if these operations conform to rules that will be similar to the conditions and limitations contained herein, that there will be an adequate degree of aviation safety for the public to be afforded an opportunity to experience a flight in EAA's B-17 and the other U.S. World War II vintage military aircraft.

In consideration of the foregoing, I find that a grant of exemption is in the public interest and an adequate level of safety will be provided. Therefore, pursuant to the authority contained in 49 U.S.C. Sections 40113 and 44701, formally Sections 313(a) and 601(c) of the Federal Aviation Act of 1958, delegated to me by the Administrator (14 CFR 11.53), EAA Aviation

Foundation, Inc. and the Experimental Aircraft Association, Inc. and its members are granted an exemption from Sections 91.315, 119.5(g), and 119.21(a) of the Federal Aviation Regulations to the extent necessary to permit it to operate its Boeing B-17, that holds a limited airworthiness certificate, for the purpose of carrying its members for compensation or hire in its former military vintage airplane. This grant of exemption is subject to compliance with the following conditions and limitations:

EAA is permitted, under the terms of this grant of exemption, to operate its limited category B-17 airplane for conducting "flight experience" operations for educational and historical purposes for its members in return for donations from those members, and provided:

1. EAA continues to maintain its B-17 in accordance with the--
 - a. Maintenance requirements as specified in its B-17's type specification sheet, as amended.
 - b. FAA-approved maintenance inspection program which meets the requirements of Section 91.409; and
 - c. Appropriate military technical manuals on the B-17.
2. The pilot-in-command crewmember must --
 - a. Hold at least a commercial pilot certificate with a multi-engine airplane rating, an airplane instrument rating, and a B-17 type rating;
 - b. Have completed EAA's B-17 qualification and recurrent flight and ground training program within the previous 12 calendar months;
 - c. Have at least a total of 2500 hours of aeronautical flight experience, 1000 hours of aeronautical flight experience in multiengine airplanes, and 25 hours in a B-17,

or in the alternative,

Have at least a total of 1000 hours of aeronautical flight experience, 200 hours of aeronautical flight experience in multiengine airplanes, and 100 hours and 50 takeoffs and landings in a B-17; and
 - d. Have accomplished 3 takeoffs and 3 landings to a full stop in a B-17 within the previous 90 days prior to serving as a pilot in command.
3. The second-in-command crewmember must --
 - a. Hold at least a commercial pilot certificate with a

multi-engine airplane rating and an airplane instrument rating;

- b. Have completed EAA's B-17 qualification and recurrent flight and ground training program within the previous 12 calendar months;
- c. Have at least a total of 1500 hours of aeronautical flight experience, 250 hours of aeronautical flight experience in multiengine airplanes,

or in the alternative,

Have at least a total of 500 hours of aeronautical flight experience, 100 hours of aeronautical flight experience in multiengine airplanes, and 25 hours and 10 takeoffs and landings in a B-17; and

- d. Have accomplished 3 takeoffs and 3 landings to a full stop in a B-17 within the previous 90 days prior to serving as a second in command.
- 4. EAA shall have the services of an FAA-certificated airframe and powerplant mechanic available, or an appropriately rated repair station, at all stopovers to perform all required maintenance inspections and repairs.
 - 5. EAA will maintain the following records, and will make those records available for review to the FAA when requested --
 - a. The name of each pilot crewmember that EAA authorizes to conduct flight operations in its B-17 under the terms of this exemption;
 - b. Copies of each pilot crewmembers' pilot certificate, medical certificate, qualifications, and recurrent training documentation in the B-17 for the purpose of showing compliance with Condition Nos. 2 and 3;
 - c. Records of maintenance performed and maintenance inspection records for the purpose of showing compliance with Condition No. 1; and
 - d. A listing of any incident, accident, or mechanical failure of the airframe, propellers, or engine that occurred during this exemption. That listing will include the date of the incident/accident/failure; all information on the possible cause factors; and extent of injuries sustained.
 - 6. Prior to permitting a person to be carried on board its B-17 for the purposes authorized under this grant of exemption, EAA will inform that person that its B-17 holds only a limited airworthiness certificate, the significance

of a limited airworthiness certificate as compared to a standard airworthiness certificate, and that the FAA has authorized this flight under a grant of exemption from the requirements of Sections 91.315, 119.5(g), and 119.21(a). The explanation of the significance of a limited airworthiness certificate in comparison to a standard airworthiness certificate must include at least the following information:

- a. That the FAA has not established nor has it approved the standards that a limited category airworthiness certificated aircraft was built under. In contrast, standard category airworthiness certificated aircraft are built to FAA approved standards, including standards concerning the design of the aircraft and standards about life-limited parts.
- b. Limited category airworthiness certificated aircraft are issued when the FAA finds the aircraft --
 - (i) Has been previously issued a limited category type certificate and the aircraft conforms to that type certificate; and
 - (ii) To be in a good state of preservation and repair and is in a safe operating condition.
- c. Standard category airworthiness certificates are issued for an aircraft when the FAA finds the --
 - (i) Aircraft has been built in accordance with that aircraft's type certification standards as established by the Federal Aviation Administration;
 - (ii) Aircraft has been maintained in accordance with that aircraft's type certification standards as established by the FAA; and
 - (iii) Aircraft's inspection and maintenance requirements are in compliance with the applicable Federal Aviation Regulations.

7. All flight operations shall be conducted:

- a. At a minimum operating altitude of not less than 1000 feet above the ground (AGL);
- b. Between the hours of official sunrise and sunset, as established in the American Air Almanac, as converted to local time;
- c. With a minimum flight visibility of not less than 5 statute miles;

- d. With a minimum ceiling of not less than 2000 feet above the ground (AGL); and
 - e. Within a 50-nautical mile radius of the departure airport and the only permitted landing shall be at that departure airport.
- 8. Except for essential crewmembers who are not considered passengers, all flight operations shall carry no more than the maximum number of passengers permitted by the:
 - a. Aircraft's weight and balance limitations; or
 - b. Number of approved seats in the aircraft, whichever is fewer.
 - 9. Except as provided in Condition No. 10, EAA's airplane must have the equipment listed in Section 91.205(b) >minus the equipment listed in paragraph (b)(15) of that section³, and that equipment must be in an operable condition during the flight.
 - 10. EAA's airplane must have the equipment listed in Section 91.205(b)(11) and that equipment must be in an operable condition during the flight if the airplane is to be operated overwater and beyond the power-off gliding distance from shore.
 - 11. EAA must hold and continue to hold a determination from the United States Internal Revenue Service as a Section 501(c)(3) non-profit, tax exempt, charitable organization under Sections 509(a)(1) and 170(b)(1)(A)(vi) of the Internal Revenue Code.

Unless sooner superseded or rescinded, this exemption expires on October 31, 1998.

/s/ Thomas C. Accardi
Director, Flight Standards Service

Issued in Washington, D.C., on November 8, 1996.